Nos. 9 and 16

Supreme Court of the United States

OCTOBER TERM, 1968

NACIREMA OPERATING CO., INC. and
LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

—v.—

WILLIAM H. JOHNSON, JULIA T. KLOSEK and
ALBERT AVERY.

JOHN P. TRAYNOR and JERRY C. OOSTING,
Deputy Commissioners,

Petitioners,

—v.—

WILLIAM H. JOHNSON, JULIA T. KLOSEK and
ALBERT AVERY.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, AS *AMICUS CURIAE*

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TABLE OF CONTENTS

OTHER AUTHORITIES

Cases:

Supreme Court of the United States

Nos. 528 and 663

October Term, 1968

Nacirema Operating Co., Inc. and
Liberty Mutual Insurance Company,

Petitioners,

—v.—

William H. Johnson, Julia T. Klosek and
Albert Avery.

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Consent of Parties

All of the parties in both cases have consented in writing to the filing of this brief *amicus curiae,* and their written consents have been filed with the Clerk.

Statement of Interest

The International Longshoremen's Association, AFL-CIO, ("ILA") is an international labor union representing the bulk of the workingmen covered by the Longshoremen's and Harbor Workers' Compensation Act. The ILA represents all longshoremen along the Atlantic and Gulf Coasts from Maine to Texas, on the Great Lakes, and on various inland waterways. Its approximately 100,000 members and their families are the principal intended beneficiaries of this Act.

The ILA was one of the chief sponsors of the Act in 1926 and 1927, and several ILA representatives testified in its support at the Congressional hearings leading to its enactment.

As representative of the employees principally concerned with the administration and construction of this vital, remedial statute, the ILA is intensely interested in assuring equitable treatment to all its members who load and discharge waterborne cargo in the harbors of the United States. The union participated as *amicus curiae* in these cases before the Court of Appeals for the Fourth Circuit.

The Nature of Longshore Employment

The essence of longshore employment, and the only type of work involved in these cases, is the loading of cargo from pier to vessel and the discharge of cargo from vessel to pier. The term "pier" means a man-made structure extending out over the navigable waters, typically for a distance of several hundred feet.

The piers in these cases rested on pilings which sank at intervals into the water below. These pilings did not obstruct the free flow of water beneath the pier, and indeed, permitted the passage of small boats and barges (App. 45).

Longshoremen customarily work in a gang or group, and members of the gang are located interchangeably on the ship or the pier. The same men may be shuttled back and forth from ship to pier throughout the day as the nature and flow of cargo operations dictates. Gang members often interchange assignments between the ship and dock so that the more onerous work in the ship's hold is rotated among the members of the group (App. 45).

In some operations, longshoremen actually carry or hand-truck cargo from ship to dock, or vice versa, so that they are constantly moving from one surface to the other.

Because the same longshoreman works both on the vessel and the pier in the usual course of his daily employment, his employment falls within the scope of both federal and state compensation statutes, however construed, and the employer must therefore cover his longshore employees under each Act. *Michigan Mutual Liability Co.* v. *Arrien*, 344 F. 2d 640, 647 (2d Cir. 1965) *cert. den'd.*, 382 U.S. 835.

Summary of Argument

1. Respondents' injuries occurred "upon navigable waters" and are therefore covered by the Longshoremen's Act. A pier is a man-made structure extending out over the freely flowing waters without changing the boundaries or course of the waterway. The waters remain navigable in fact, and the presence of readily removable man-made structures protruding into the stream does not deprive the entire stream, including that portion flowing under the deck of the pier, of the status of "navigable waters".

The legal fiction developed in early cases that a pier is a permanent extension of the land is irrelevant. That fiction, which is factually inaccurate, served to delimit the then understood constitutional boundaries between state

regulatory jurisdiciton and admiralty tort jurisdiction. But the Longshoremen's Act, as this Court has held, did not codify these pre-1927 demarcation lines, and the fact that state jurisdiction may validly extend to pierside injuries does not preclude coverage under the Federal Longshoremen's Act as well. Nothing in the Longshoremen's Act itself bars coverage of injuries on piers extending over navigable waters, and the Act covers all injuries upon navigable waters, not merely some of them.

2. The Longshoremen's Act represents an exercise of the fullest Congressional power over the subject matter. Congress unquestionably has power to provide compensation for longshoremen injured on the pier while loading or discharging vessels moored alongside. Any doubt as to this is removed by the 1948 Admiralty Extension Act which confirmed the extension of admiralty and maritime jurisdiction to pierside injuries and which overruled legislatively the judicial decisions underlying the legal fiction that a pier is an extension of the land.

The original language of the compensation bill introduced into Congress in 1926 covered all injuries "within the admiralty jurisdiction". Subsequently representatives of interested labor unions, employer organizations and the United States Department of Labor all testified in favor of coverage of longshoremen's pierside injuries. Some testified that the language of the bill accomplished this objective, while others expressed doubts and urged that the language be expanded to assure that the desired coverage was achieved. The legislative history thus indicates that the term "upon navigable waters" was substituted for the term "within the admiralty jurisdiction" not to narrow the scope of the bill, but to make sure that its coverage extended to all injuries intended by its proponents to be covered, to the fullest extent permissible under the Constitution.

3. Although apparent incongruities in peripheral cases may be suggested under any coverage test, the most basic incongruity would be to give only partial compensation protection to longshoremen who regularly work interchangeably on the vessel and the pier. The test urged by petitioners defeats the basic Congressional purpose of assuring uniform, certain protection which is not dependent upon the vicissitudes of state coverage.

ARGUMENT

I.

The Longshoremen's Injuries in These Cases Occurred Upon the Navigable Waters of the United States.

Petitioners' argument rests, at bottom, on the proposition that the 1927 Longshoremen's Act was intended to provide compensation coverage only for those employees whom this Court had previously held to be beyond the constitutional reach of state legislation; and since the Court had held a pier to be "an extension of the land" prior to 1927, pierside injuries were subject to state law and, therefore, outside the scope of the federal act.

Such a restrictive concept of the Longshoremen's Act was squarely rejected by this Court in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962). In *Calbeck* the Court reversed a denial of federal compensation to a worker whose injury under the pre-1927 decisional law was clearly compensable under state legislation. Holding that the injury fell within the "twilight" zone covered by both federal and state compensation statutes, the Court finally laid at rest the notion that permissible state compensation coverage, even if expressly sanctioned by pre-1927 judicial decisions, necessarily precluded fed-

eral protection as well. See also *Davis* v. *Department of Labor,* 317 U.S. 249 (1942).

Both before and after *Calbeck,* the courts have sustained federal coverage of injuries which unquestionably also fell within the concurrent jurisdiction of the state. *Avondale Marine Ways, Inc.* v. *Henderson,* 346 U.S. 366 (1953); *Interlake Steamship* v. *Nielson,* 338 F.2d 879 (6th Cir. 1964); *Holland* v. *Harrison Bros.,* 306 F.2d 369 (5th Cir. 1962).

Thus the fact that early federal decisions considered a pier to be an extension of the land, and hence within the reach of state power, does not answer the question posed by these cases. For the Compensation Act does not in terms exclude injuries occurring on a pier resting over water, or for that matter, on any man-made structure extending into the natural course of navigable waters. Rather it expressly embraces all injuries occurring upon the navigable waters, and, at least since *Calbeck,* this means whether or not state jurisdiction may also validly attach.

A pier is in fact "upon navigable waters", as that term is commonly understood and as it has developed in the law of admiralty. A pier is nothing more than a man-made protuberance sticking out into the course of the stream, but leaving unchanged the natural course of the waters. It is like a finger, and most piers are known in the maritime industry as "finger piers".

Unlike permanent land fill, the construction of a pier above the flowing waters does not change the boundaries of the waterway one iota. The shoreline remains precisely as it was in its natural state.

Nor is it accurate to characterize a pier as a "permanent" structure. Like any man-made construction (and

most piers are far from the sturdiest of man's creations) built for a specific purpose, piers become obsolescent, both physically and technologically. In the Port of New York, for example, recent years have witnessed the demolition of a number of deteriorating piers. New methods of cargo storage and handling are rendering other piers industrially inadequate, and they too will be torn down. In some instances a demolished pier is, in time, replaced by another one, usually with different dimensions and located over a different portion of the navigable stream. In other instances the pier is not replaced at all, for fewer piers with larger adjacent landward storage areas now serve the purpose of a multitude of older piers.

But the "navigable waters" of admiralty jurisdiction do not depend upon these vicissitudes. Rather they are determined by the natural, historic boundaries of the stream in its natural state irrespective of man-made "fingers" which may jut out above the waters. Cognizant of this Court's admonition that "When once found to be navigable, a waterway remains so" (*United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940)), the Court of Appeals for the Second Circuit has held a body of water to be navigable if "it has been used or was suitable for use in the past, or . . . it could be made suitable for use in the future by reasonable improvements" (*Rochester Gas and Electric Corp.* v. *Federal Power Commission*, 344 F.2d 594, 596 (2d Cir. 1965). This Court has itself held that the existence of "artificial obstructions . . . does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state." *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 118 (1921). See also *The Montello*, 87 U.S. 430, 431 (1874); *Greenleaf Johnson Co.* v. *Garrison*, 237 U.S. 251, 268 (1915).

In light of these authorities, the Court below aptly concluded that "the waters in the instant case" were "navigable in fact" because they were "navigable prior to the construction of the pier, will again be open to unlimited navigation if the piers are ever removed, and most relevantly, are now used in navigation." (App. 55-56, footnote 15).

The International Longshoremen's Association urges that injury upon any pier extending into the stream is covered by the Act whether or not the waters continue to flow beneath its deck. Although some piers are constructed so as to block the waters' flow while they remain standing, these, too, are located over the course of the stream in its natural state. Waters formerly flowed where the pier currently stands and will flow again upon its removal. Such a pier, like a pier built on pilings, does not change the natural shoreline. In either event, the pier is located upon the navigable waters.

A fortiori the statutory standard is met when, as in the cases at bar, the waters continue to flow freely under the pier and small boats continue to navigate under the pier deck on which the injuries occurred. For the navigability of a body of water has never depended upon the size of the vessel capable of using it, and the term "navigable waters" even includes falls, shallows or rapids which compel recourse to land carriage over a portion of the journey. 16 U.S.C. § 796; *United States* v. *Holt State Bank*, 270 U.S. 49 (1926); *Morrison-Knudsen Co.* v. *O'Leary*, 288 F.2d 542 (9th Cir. 1961), *cert. den'd*, 368 U.S. 817; *Miami Beach Jockey Club* v. *Dern*, 83 F.2d 715, 718 (D.C. Cir. 1936).

Obviously the words "upon navigable waters" do not require that the victim be actually touching the waters themselves at the moment of injury, for the Act does not limit its protection to swimmers and divers. There is no dispute

that a longshoreman working aboard ship is covered by the Act, although the deck of a ship is usually higher above the water than the deck of the pier to which it is moored.

Assuming *arguendo* that *situs* limitations have any applicability to the scope of Longshoremen's Act coverage,[1] the term "upon navigable waters" means, at most, that the claimant be upon some surface which is either above the waters, on a vertical plane, or, taking a stricter test, that he be standing upon a surface which itself touches the navigable waters. The pier meets this test as fully as the vessel.

It has been held that the term "on the high seas" connotes a vertical dimension and not merely a horizontal plane, thus embracing injuries occurring in an airplane flying over the ocean. *D'Aleman* v. *Pan American World Airways*, 259 F. 2d 493 (2d Cir. 1958); *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963). The word "upon" in the Longshoremen's Compensation Act can hardly b given narrower meaning than the word "on"

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[1] Although certain briefs supporting petitioners' position devote considerable attention to the question of "status" as against "situs" orientation, it must be borne in mind that the decision below does not rest on this ground alone. The court below, while favoring a status approach, also expressly held that the injuries occurred "upon navigable waters" in a situs sense. Under the correct construction of that statutory term, there would appear to be little difference in coverage between the two standards, apart from peripheral cases which can be readily conjured up under any test. Congress intended to protect "longshoremen", a group understood to mean employees engaged in loading and unloading ships. *Norton* v. *Warner Co.*, 321 U.S. 565, 570 (1944). The loading and unloading of ships is performed essentially on the ship itself or on the adjacent pier, with some work performed on gangway, skid or similar device. Since all such places are situated "upon navigable waters", the basic coverage contemplated by statute is achieved under either test. It is only when the term "upon navigable waters" is given the improperly restrictive construction contended for by petitioners that a divergence in impact develops through exclusion of a substantial portion of the longshore work force which Congress intended to protect.

in the Federal Death on the High Seas Act. (46 U.S.C. §§ 761-767, 41 Stat. 537).

Cases dealing with drydock injuries have sustained coverage of employees standing on dry land, immediately alongside the drydock, when the work is essential to the performance of the operations of the drydock. *Holland* v. *Harrison Bros. Drydock & Repair Yard, Inc.*, 306 F.2d 369 (5th Cir. 1962); *Maryland Cas. Co.* v. *Lawson*, 101 F.2d 732 (5th Cir. 1939); cf. *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366 (1953). A longshoreman loading and discharging a vessel from the immediately adjacent pier which itself lies over the natural course of waterway is entitled to no less protection.

In essence petitioners' argument rests on a legal fiction embodying two factual errors. The legal fiction proclaims that a pier is a permanent extension of the land. In fact, it is neither permanent nor an extension of the land. It does not change the course of the waterway or the boundary line between land and water. When it is removed, the waters flow just as before. And a large portion of American piers, like those herein, do not even interrupt the passage of the waters while they stand.[2]

The longshoremen whom Congress intended to protect through this remedial Act cannot be denied that protection

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[2] This legal fiction is functionally inaccurate as well. Its functional *rationale* was expressed in the early case of *Cleveland T. & V.R. Co.* v. *Cleveland Steamship Co.*, 208 U.S. 316 (1908), the cited authority for *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, 275 (1922), as follows (208 U.S., at 321):

> "But the bridges, shore docks, protection piling piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such."

It is difficult to understand how a pier, without which waterborne commerce would be impossible, can be characterized as con-

through invocation of a legal fiction, particularly one developed in other contexts. For it is irrelevant, in light of *Davis* and *Calbeck*, that this fiction served as constitutional sanction for state regulation of injuries or transactions occurring on piers and wharves. And it is equally irrelevant that this same fiction at one time may have been thought to set limits to admiralty tort jurisdiction. In 1969 there can be no doubt that Congress may lawfully provide compensation protection to injuries sustained by longshoremen on piers situated over, and extending into, the navigable waters, either under admiralty tort jurisdiction, admiralty contract jurisdiction, or the commerce power.

Nothing in the Act itself justifies a denial of protection to longshoremen loading and discharging vessels from piers or wharves, and any claim that the legal fiction on which it rests remains relevant today was swept away by *Davis* and *Calbeck*.

In the apt words of Judge Cardozo, quoted in a similar context in the Longshoremen's Act case of *Michigan Mutual Liability Co.* v. *Arrien*, 344 F.2d 640, 644 (2d Cir. 1965) the instant case is a striking example of

> "the dangers of a 'jurisprudence of conceptions' * * * the extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' * * * In such circumstances, * * * general

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cerning only "commerce upon land" and not an "aid to commerce" upon water. Piers are aids to navigation upon navigable waters. *Atlee* v. *Northwestern Union Packet Co.*, 21 Wall. 389, 393 (1875).

In any event, this underlying functional explanation of the *Nordenholt* rule is essentially "status oriented", not "situs oriented" at all. On the one hand petitioners insist that the Longshoremen's Act is exclusively "situs oriented", and in the next breath they urge that in the crucial area of pierside injuries, coverage must be denied on the basis of a judge-made rule which is nowhere reflected in the statute itself and which is plainly status oriented in its derivation.

> maxims * * * framed alio intuitu * * * must be reformulated and readapted to meet exceptional conditions."

Quoting approvingly from his own brief in *Calbeck* the Solictor General's brief (p. 12) concedes that a "dock" is in fact "upon navigable waters". This, we submit, is dispositive of the instant cases. For if a pier, like a vessel, sits "upon navigable waters", then the statutory test is satisfied just as fully by the longshoreman standing upon the deck of a pier as by the longshoreman standing upon the deck of a vessel.

Point III of the Solicitor General's brief implicitly recognizes the force of this argument, but urges that such a disposition would disturb the "*Jensen* line of demarcation". In so arguing, however, it is the Solicitor General, not the court below, who is seeking to ignore the language actually used by Congress and to distort the coverage test prescribed by the Act. As this Court held in *Calbeck*, (370 U.S. at 117) "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." This holding simply cannot be reconciled with the approach urged by the Solicitor General herein.

II.

The Terms, Purpose and Legislative History of the Act Confirm the Intent to Cover Pierside Longshore Injuries, to the Full Extent Permitted by the Constitution.

The Longshoremen's and Harbor Workers Compensation Act is entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain maritime employment." 44 Stat. 1424. This Court reiterated in *Calbeck* that the Act extends not to some but "all injuries sustained by employees on navigable waters", 370 U.S. 114, at 117, and, again, at 120. Emphasizing the breadth of the statutory coverage, the Court there (370 U.S., at 130) held, quoting with approval from *Continental Casualty Co.* v. *Lawson*, 64 F.2d 802, 804 (5th Cir. 1933):

> "The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter."

There can be little question that Congress is amply empowered under various jurisdictional heads to provide compensation for longshoremen injured in the loading or discharge of a ship while standing on the adjacent pier. The Admiralty Extension Act of 1948, 62 Stat. 496, 46 U.S.C. Section 740, which relates only to admiralty tort jurisdiction, is more than sufficient to demonstrate Congressional jurisdiction over the injuries suffered by the claimants at bar. And the Admiralty Extension Act itself did not necessarily push the Congressional power in admiralty tort to its furthermost Constitutional limits.

That the legislative history of the Admiralty Extension Act did not expressly refer to the Longshoremen's Compensation Act is not significant. The Admiralty Extension Act applied generally to "the admiralty and maritime jurisdiction of the United States" and extended to "all cases of damage or injury" caused by a vessel "on navigable water" (substantially the same term used in the Longshoremen's Act). There was no need for Congress to enumerate every instance in which this general extension of admiralty jurisdiction affected the scope of some pre-existing right or claim, whether conferred by statute or developed through decisional law. Nor is there any reason why subsequent amendments to the Longshoremen's Act which merely increased the level of benefits should have referred to the effect on coverage of the Admiralty Extension Act.

The significant point is that the Longshoremen's Act was cast in terms of a concept—"navigable waters"—which traditionally expressed the fullest scope of admiralty jurisdiction *Caldaro* v. *B. & O. Railroad Co.*, 166 F.Supp. 833 (E.D.N.Y. 1956). Thus when Congress in 1948 made clear that admiralty jurisdiction extended to pierside injuries, it must have understood that it was thereby affecting the coverage of the Compensation Act or at least eliminating doubts as to coverage stemming from earlier judicial decisions of which Congress obviously disapproved.

For it is clear that the Admiralty Extension Act overruled legislatively the very decisions (e.g. *Cleveland T. & V.R. Co.* v. *Cleveland Steamship Co., supra,* 208 U.S. 316) which form the basis of the "pier is an extension of the land" doctrine, on which petitioners herein rest their case. See *Michigan Mutual Liability Co.* v. *Arrien,* 233 F.Supp. 496 (S.D. N.Y. 1964), *aff'd.,* 344 F.2d 640; *Boston Metals Co.* v. *O'Hearne,* —— F.Supp. ——, 1964

AMC 2351 (D.Md.) *aff'd.*, 329 F.2d 504 (4th Cir. 1964), *cert. den'd*, 379 U.S. 824.

When the longshoremen's compensation bill was originally introduced in Congress in 1926, its coverage extended to all injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." S.3170 and H.R.9498. In retrospect, it seems clear that had this language remained, the present claimants would have qualified, under current statutory and judicial concepts of admiralty jurisdiction. The question then arises as to whether the substitution of the statutory language "upon the navigable waters of the United States" for the original language "within the admiralty jurisdiction" was designed to narrow the coverage of the bill.

Nothing in the legislative history indicates any such intent. Indeed, the legislative history is to the contrary. Although some witnesses believed the original language adequate to cover pierside injuries (Hearings on S.3170, Senate Committee of the Judiciary, 69th Cong., 1st Sess., pp. 26-27), others feared that the coverage clause was "indefinite" and "vague" (Ibid, p. 95). One experienced admiralty lawyer, questioning the adequacy of this clause, observed that

> "We want to be sure that every-body gets in under those words. And I am not sure that they do." (Ibid, p. 101.)

The Chairman himself expressed doubt that the clause contained a "sufficient description" of the coverage intended. (Ibid. p. 56.)

Significantly, a spokesman for the United States Department of Labor testified in favor of coverage of in-

juries occurring on the dock as well as the ship (Ibid, pp. 40-41). As far as is known, the Department of Labor has, to date, never changed its position that the Federal statute, once adopted, covered injuries sustained by workers engaged in maritime employment over, above, or bordering upon navigable waters.

As the Court below observed (App. 47), the hearings on this bill did not present the usual pattern of labor representatives urging one course and employer representatives urging the opposite. Here broad coverage was sought by both sides. It is, therefore, reasonable to conclude, as did the Court below, that the substitution in language was not designed to narrow the coverage of the bill, but, if anything, to broaden it.

In this connection the Second Circuit, in *Michigan Mutual Liability Co.* v. *Arrien, supra* 344 F.2d 640, observed (p. 645, footnote 3):

> "Moreover, we are not persuaded that ancient decisions fixing the limits of admiralty jurisdiction should be determinative when the issue is whether a Deputy Commissioner's conclusion that an injury occurred 'upon the navigable waters,' within the meaning of the Compensation Act, is contrary to the law. Indeed, the dissent's recognition that in enacting the 1927 Act Congress chose the phrase 'upon the navigable waters,' rather than 'within the admiralty jurisdiction,' suggests rejection, rather than adoption, of distinctions evolved in fixing the reach of the federal admiralty jurisdiction."

This reading of the legislative history accords with the statement of the Court in *Calbeck* (370 U.S. at 126) rejecting "the line of demarcation as a static one fixed at pre-1927 constitutional decisions."

In short, Congress did not intend to freeze the statutory coverage by the very line of decisions whose effects it was seeking to overcome. It is, therefore, a frustration of Congressional purpose to limit the statutory terms—whether they be "admiralty jurisdiction" or "navigable waters"—to their pre-1927 content, although we would also urge that even the 1927 meaning of "navigable waters" sustains respondents' position herein. But as the statutory terms receive further judicial development and amplification, the statute itself must be construed accordingly. Particularly is this so when Congress chose to define the statutory coverage through a term—"upon navigable waters"—which pervades admiralty law generally. Congress must have intended that as this term became the subject of further judicial development, its meaning in Section 3 of the Longshoremen's Act would develop accordingly. Certainly there is no indication either in the statute or its legislative history that Congress intended the term "upon navigable waters" to be given anything less than its fullest and broadest scope.

The single excerpt from the Senate Committee Report, so heavily relied upon by petitioners, does not evince a Congressional intent to eliminate coverage of pierside injuries. The statement that coverage extends only to injuries occurring between wharf and ship "so as to bring them within the maritime jurisdiction" is not cast in terms of Congressional intent but as a Constitutional limitation on the power of Congress. It must be recalled that the Supreme Court had only recently invalidated a different form of Congressional response to earlier Court decisions, and the entire subject had been treated judicially in constitutional terms. The Senate report indicated nothing more than the draftsman's prediction of the limited scope which the Court would permit to a federal compensation law.

If the understanding of the draftsman of the Senate Report as to the limits of maritime jurisdiction was inaccurate, or if the Court's own pre-1927 decisions on this subject were overly restrictive, or, if the maritime jurisdiction expanded over the years, there is no evidence that Congress intended the pre-1927 judicially imposed limitations to serve as a continuing limitation on the scope of an act expressly intended to protect longshoremen engaged in loading and discharging vessels. On the contrary, *Calbeck* teaches that Congress intended to use the full scope of its admiralty powers and that the term "upon navigable waters" should be given its broadest meaning without regard to the demarcation line apparently prescribed by the pre-1927 cases.

III.

The Statutory Construction Adopted Below Eliminates the Basic Incongruity and Inequity of Providing Federal Compensation to Longshoremen During Only a Portion of Their Working Day and Leaving Them Otherwise Dependent on the Vagaries of State Compensation Laws.

It is not difficult to pose apparent incongruities in borderline cases under any standard adopted under the Longshoremen's Act. Both opinions below engage in this technique, and other examples may readily be suggested. For example, under petitioners' proposed test, a longshoreman hit by a ship's crane while standing on a pier is covered by the federal act if he is knocked off the pier and into the water. But the same man standing on the same spot and hit by the same crane is unprotected if he falls on the pier itself. Moreover, he would presumably be unprotected if he was knocked off the pier but suffered his

injury by hitting the side of the pier before his body reached the water.[3]

On the other hand, it is unclear under petitioners' test whether federal protection would attach to a longshoreman who had been standing on the edge of the pier, but who had jumped up, or outwards, prior to the moment of impact, so that his feet were not touching the pier at that crucial moment.

Adjudicated cases have approved compensation to drydock employees standing on land alongside the drydock on the ground that their work is integral to the drydock operation. See p. 10, *supra*. But petitioners would deny compensation to longshoremen whose work is equally integral to the loading or discharge of the adjacent vessel and who are standing not on dry land but on a pier which extends over the navigable waters. No such distinctions can be justified under the purpose and terms of the Act.

All these incongruities pale into insignificance, however, before the basic, pervasive incongruity urged by petitioners: that longshore operations performed by employees working interchangeably between vessel and pier are covered by the Longshoremen's Act during the moments when they work on the vessel but not when the same men

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[3] In *Davis* v. *Department of Labor*, 317 U.S. 249, 254, this Court remarked that the closeness of many cases raising "points of interpretation [under the Longshoremen's Act] has caused much serious confusion". In an accompanying footnote, the Court then declared that "a question not mentioned above which has been considered in several cases is that of the jurisdiction to which are to be assigned accidents affecting persons loading boats while on the wharf; accidents affecting persons loading vessels while on the vessel; accidents affecting persons standing on either the vessel or the wharf who are knocked into the water". This hardly seems to indicate that the question of longshoremen suffering pier-side injuries was deemed so definitely settled as to preclude federal "twilight zone" protection.

perform the same function during the same day on the adjacent pier.

Such a construction, moreover, leads to the very results condemned by this Court in *Calbeck*. It defeats the uniformity and certainty of coverage intended by Congress, and it leaves longshoremen working on the pier dependent upon the uncertain coverage of state compensation laws.

Finally, the test adopted by the Fourth Circuit is readily administerable. If status be the criterion, then the simple issue is whether the claimant was engaged at the time of injury in the loading or discharge of a vessel, and the far-fetched examples suggested in opposing briefs have no pertinence. If situs be deemed the appropriate approach, then all injuries occurring within and above the confines of the natural boundaries of the waterway, without regard to the artificial, non-permanent intrusion of man-made piers, are covered. At the very least, longshore injuries would be covered if they occurred on a place located above the flowing navigable waters. Any of these tests is easier to administer than that urged by petitioners and would also satisfy the dual objective discussed in *Calbeck*: to assure that longshoremen are protected by some compensation law and to eliminate uncertainty as to the scope of coverage of the federal Act.

CONCLUSION

For all the foregoing reasons, the International Longshoremen's Association, AFL-CIO, respectfully submits that the judgments herein of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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